Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1997

AMERISOURCE CORPORATION, *et al.*,

Petitioners,

v.

HJB, INC., *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

REPLY BRIEF OF PETITIONERS

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Petitioners' statement for purposes of this Court's Rule 29.6, which appears at Pet. ii-iii, remains accurate.

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REPLY BRIEF OF PETITIONERS

Respondents' opposition is notable for what it does *not* say. Respondents do not deny (indeed, they concede) that the courts of appeals are in conflict on the question presented in the petition. They do not deny that the issue is a recurring and enormously important one. They do not deny that questions about the application of *Matsushita Elec. Indus. Co.* v. *Zenith Radio Corp.*, 475 U.S. 574 (1986), often arises in cases that affect the operation of national industries, or that this case *itself* involves an attempt to displace settled business practices that are essential to the efficient operation of the Nation's pharmaceuticals business. And they do not deny that, if our description of the Seventh Circuit's decision is accurate, the holding below cannot be reconciled with this Court's decision in *Matsushita*.

Instead, respondents hinge their opposition principally on the assertion that the petition misstates the court of appeals' holding. In making this claim, respondents demonstrate a notable facility for derogatory turns of phrase, variously labeling our position a "blatant misrepresentation" (Br. in Opp. 4), a "false description" (*id.* at 5), a "clear[ ] misstate[ment]" (*id.* at 7), an "attack[ ] on members of the federal judiciary" (*id.* at 14), and "frankly absurd" (*id.* at 16). This bluster, however, puts one in mind of the emperor's new clothes; respondents' vehemence evidently is designed to conceal the very noticeable lack of substance in their position. In fact, the Seventh Circuit's opinion states a standard that departs from *Matsushita*, that conflicts sharply with the holdings of other courts of appeals, and that will make it virtually impossible for antitrust defendants to obtain summary judgment whenever they have engaged in the sorts of routine communications along the *vertical* distribution chain that typically are unavoidable. In these circumstances, respondents have not offered any substantial reason for the Court to deny review.

1. Respondents assert that the petition is "unwilling to rely on the words used by the court of appeals to state its own ruling" (Br. in Opp. 5); they go on to contend (at 7-8, 10-12) that the decision below is faithful to *Matsushita*'s holding that "conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy." 475 U.S. at 588. See *ibid.* ("antitrust law limits the range of permissible inferences from ambiguous evidence in a § 1 case"). But that assertion misstates both our argument and the court of appeals' holding.

The relevant discussion in the Seventh Circuit's opinion is in two parts. The court first addressed the evidence in the record. Noting that petitioners offered "an innocent interpretation" of the various bits of evidence upon which respondents rely (Pet. App. 29a), the court of appeals held that summary judgment had to be denied because "[t]he defendants' interpretations may be correct; they are not *inevitable*." *Id.* at 30a (emphasis added). In reaching this conclusion, the court did *not* acknowledge, as respondents would have it, that ambiguous evidence is insufficient to overcome a defendant's motion for summary judgment. And the court expressly *rejected* the view that "when the evidence is in equipoise * * * summary judgment will be granted [to the defendant]" (2 P. AREEDA & H. HOVENKAMP, ANTITRUST LAW ¶ 322, at 70 (rev. ed. 1995)), holding instead that the defendant must be denied summary judgment when its innocent interpretation of the evidence is not *inevitable*.

The court next addressed *Matsushita*. It recognized that, under *Matsushita*, "summary judgment for a defendant is proper, even if there is some evidence of an antitrust violation, if the plaintiff's theory of violation *makes no economic sense*." Pet App. 30a (emphasis added). The court went on to hold *Matsushita* inapplicable here because it could not be said that respondents' economic theory "make[s] no sense." *Id.* at 31a. As respondents correctly observe (at Br. in Opp. 7), "[t]his is all that the

court of appeals had to say about *Matsushita*." But that is precisely our point: the Seventh Circuit regarded *Matsushita* as relevant only when the plaintiff's economic theory is implausible. As we explain in the petition (at 12-19), that rule also has been adopted by the Third, Sixth, and Ninth Circuits, while being rejected by six other courts of appeals.

Although the court of appeals' characterization of the governing standard is clear enough, its minimalist take on *Matsushita* is confirmed by its treatment of the evidence in the case. The district court, which addressed *Matsushita* at length (see Pet. App. 43a-44a), closely reviewed the record and concluded that petitioners were entitled to summary judgment because the economic power and role of the pharmaceuticals manufacturers "more compellingly explains the chargeback system rather than theories of wholesaler complicity." *Id.* at 93a. In reversing this decision, the court of appeals did not take issue with the district court's finding that petitioners' conduct was as (or more) consistent with innocent conduct as with illegal conspiracy. *Matsushita*, 475 U.S. at 588. Instead, relying on conduct that this and other courts have found to be routinely present in noncollusive industries (see Pet. 17-18, 24-25), the Seventh Circuit denied summary judgment because the evidence was *not inconsistent* with respondents' theory of conspiracy – that is, the innocent interpretation was "not inevitable." The court of appeals thus misapplied *Matsushita*, and that mistake dictated the outcome of this case.

2. The court of appeals' error also comes clear from a close look at the record. In arguing that the decision below is consistent with *Matsushita*, respondents assert that the wholesalers conspired among *themselves* to deny sales to retail buying groups and that "[c]ompetitive firms do not join together to ask their suppliers to refuse to bid to other competitors" (Br. in Opp. 11); that the wholesalers were involved in "soliciting and receiving commitments from manufacturers that they would not

bid to buying groups" (*id.* at 12); and that the wholesalers "took an active role in developing [the chargeback] system and promoting its wider use." *Ibid.* Respondents' contention, however, misstates both the court of appeals' holding and the state of the record.

The court below did not rely upon (or suggest that there *was* any) evidence of the *horizontal* wholesalers' conspiracy now alleged by respondents. Nor did the court indicate that the wholesalers solicited or received commitments *from* the manufacturers. Nor did it even remotely suggest that the wholesalers promoted use of the chargeback system. Instead, the court of appeals relied *entirely* on what it characterized as evidence that the wholesalers "urge[d]" manufacturers not to discount to retail pharmacies and "pledge[d] to adhere to the chargeback system." Pet. App. 29a. Yet as we showed in the petition (at 23-26) – and as respondents conspicuously do *not* deny – this Court held in *Monsanto Co.* v. *Spray-Rite Service Corp.*, 465 U.S. 752 (1984), that virtually identical evidence of vertical communications between distributors and manufacturers is insufficient to defeat summary judgment. We also showed (at Pet. 17-19) that, faced with evidence that is essentially indistinguishable from the "tasty morsels" identified as the *most* probative portion of the record by the court below, other courts of appeals have ruled for antitrust defendants. Again, respondents make no response.

It may be that the court of appeals did not rely upon the sorts of evidence trumpeted by respondents because there is *no such evidence* in the record. Certainly, respondents' assertions find no support at all in the portions of the record that they cite in their opposition to the petition:

- Respondents assert that the wholesalers used their trade association to "join together" and "ma[k]e requests of manufacturers not to bid to * * * buying groups." Br. in Opp. 11. But the portion of the district court opinion cited

in support of this contention (Pet. App. 53a-54a) recounts evidence of "a 'general agreement' among *the Manufacturers* on the subject of selling to retail buying groups." *Id.* at 53a (emphasis added). In contrast, there is not a word suggesting that the *wholesalers* reached any agreement among themselves.

- Respondents assert (at Br. in Opp. 12) that the wholesalers solicited and received commitments from the manufacturers not to bid to retail buying groups. But the portion of the court of appeals' opinion cited by respondents in support of this contention (Pet. App. 27a-28a) addresses a jurisdictional question that is wholly off the point; the cited section of the district court opinion (*id.* at 53a-54a) again addresses evidence of an agreement *among manufacturers* and says nothing at all to suggest that the wholesalers either solicited or received any assurances *from* the manufacturers. The absence of any such evidence is hardly surprising: the district court expressly found that "[t]he wholesalers were *not* consulted about the no-discount policies prior to or during their implementation, and *no evidence* exists that the wholesalers' position was considered by or carried any weight with the manufacturers." Pet. App. 80a (emphasis added).

- Respondents assert (at Br. in Opp. 12) that the wholesalers "took an active role in developing" the chargeback system and "promot[ed] its wider use." But respondents cite *nothing at all* in support of this contention. In fact, as we have noted, the district court found (and the court of appeals did not disagree) that the wholesalers had *no* involvement "in the decisions not to afford

discounts to the plaintiffs" and did not have a "conscious commitment to achieve the unlawful objective." Pet. App. 80a; see *id.* at 93a.[1]

Having said this, it bears emphasis that the dispute here is not a factual one. Instead, our disagreement is with the legal standard applied to the facts by the court of appeals. Nor do we contend, as respondents would have it (at Br. in Opp. 13), that under the governing summary judgment standard evidence should not be construed "favorably to [antitrust] plaintiffs." Our submission, rather, is that *substantive* "antitrust law limits the range of permissible inferences from ambiguous evidence in a § 1 case." *Matsushita*, 475 U.S. at 588. Questions concerning the proper application of that principle arise frequently and – as is demonstrated by the disagreement between the court of appeals and the district court in this case – the choice of an incorrect legal standard by the Seventh Circuit in implementing that principle determined the outcome here.

3. Respondents acknowledge (at Br. in Opp. 16), albeit grudgingly, that the Third and Ninth Circuits have held that summary judgment must be denied if the

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[1] Respondents' statement of the case suffers from the same error. Although respondents assert that "the defendants reached a consensus to hold the line on th[e] spread" of price competition and declare that "the defendants refused to offer discounts to retailers, with a consistency, vigor and absoluteness that allowed no plausible explanation other than conspiracy" (Br. in Opp. 1), the evidence they cite in support of these contentions relates only to the *manufacturers*. Respondents therefore are wrong when they conclude that "the district court reviewed the evidence and concluded that the price-fixing conspiracy was essentially imposed on the wholesalers." *Id.* at 2-3. The district court did not find that the wholesalers were reluctant participants in the conspiracy, as respondents' statement suggests; instead, the court found that they were *not members of the alleged conspiracy at all*. See Pet. App. 93a-94a.

alleged conspiracy makes economic sense and the inferences of conspiracy and innocent conduct are equally plausible; respondents likewise make no attempt to distinguish *Ezzo's Investments, Inc.* v. *Royal Beauty Supply, Inc.*, 94 F.3d 1032 (6th Cir. 1996), which, as we showed in the petition (at 16), places the Sixth Circuit in the same camp. As we noted in the petition, Pet. 14-16, Professor Areeda observed that the decisions in these circuits depart from *Matsushita*. At the same time, respondents seem to recognize that the approach of these courts of appeals cannot be reconciled with the holdings of the Second, Fourth, Fifth, Eighth, Tenth, and Eleventh Circuits. See Br. in Opp. 15. But citing decisions of the Seventh Circuit that predated the holding below, respondents assert that this Court should disregard the conflict among the courts of appeals because the Seventh Circuit has aligned itself with the majority doctrine. See *id.* at 14-17.

This contention is without merit. For one thing, the older Seventh Circuit decisions cited by respondents are ambiguous; while those opinions state that antitrust plaintiffs opposing summary judgment must advance evidence " 'that tends to exclude the possibility that the defendants were pursuing * * * independent interests' " (Br. in Opp. 15, quoting *Market Force Inc.* v. *Wauwatosa Realty Co.*, 906 F.2d 1167, 1171 (7th Cir. 1990)), they never identify the quantum of evidence the plaintiffs must adduce (that is, the decisions do not establish whether plaintiffs must do more than advance evidence that is consistent with conspiracy). Indeed, the most recent of the decisions cited by respondents (at Br. in Opp. 15) relied on a holding of the Third Circuit that respondents appear to recognize as *rejecting* the majority rule. *Serfecz* v. *Jewel Food Stores*, 67 F.3d 591, 602 (7th Cir. 1995), cert. denied, 116 S. Ct. 1042 (1996), citing *Alvord-Polk, Inc.* v. *F. Schumacher & Co.*, 37 F.3d 996 (3d Cir. 1994), cert. denied, 514 U.S. 1063 (1995). And that the Seventh Circuit characterized a pre-*Matsushita* opinion of then-Judge Posner as

one that " 'appears to have articulated' " the *Matsushita* standard (Br. in Opp. 16, quoting *Valley Liquors, Inc.* v. *Renfield Importers, Ltd.*, 822 F.2d 656, 660 (7th Cir.), cert. denied, 484 U.S. 977 (1987)) hardly proves respondents' point; the question here is whether the Seventh Circuit properly understands that standard.[2]

In any event, respondents' discussion of the older cases is largely immaterial. The decision below clearly states the controlling rule; because the court of appeals denied a suggestion for rehearing en banc, that decision must be taken as an authoritative statement of the law in the Seventh Circuit. And given the acknowledged conflict among the courts of appeals, any disagreement within the Seventh Circuit (assuming that such disagreement exists) would not provide a justification for denying review now. Indeed, that there is a divergence of opinion within as well as between the courts of appeals (as to which, see also Pet. 15 n.7) serves only to demonstrate the pervasive confusion in the lower courts about the meaning of *Matsushita* and to confirm the need for this Court to clarify the law. After all, the courts of appeals have been struggling with the meaning of *Matsushita* for almost twelve years, and there is no prospect that they will reach a consensus on their own.

4. Finally, respondents' assertion (at Br. in Opp. 5) that certiorari should be denied because the appeal is interlocutory is simply silly. The question presented in the petition concerns the standard governing the award of summary judgment – and it will be impossible to address that important issue after a remand. The Court accordingly

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[2] We note that respondents are wrong in suggesting that we are offended by the "colorful language" that appears in the opinion below; we yield to none in our appreciation for Chief Judge Posner's engaging prose style. But the metaphor of "tasty morsels" employed below (Pet. App. 29a) should not obscure the court of appeals' failure to answer the obvious question about respondents' case: where's the beef?

has granted review of many cases involving challenges to the denial of summary judgment, including (very notably) *Matsushita* itself. See also, *e.g.*, *Eastman Kodak Co.* v. *Image Technical Services, Inc.*, 504 U.S. 451 (1992).

5. In light of respondents' express concessions and notable silences, it may be taken as settled that this billion-dollar case is one of enormous importance to the operation of the Nation's pharmaceuticals industry. It is essentially undisputed that the circuits are in conflict on a recurring issue of tremendous legal and practical significance. And it is plain on the face of the court of appeals' opinion that this case squarely presents the question whether the *Matsushita* standard applies when the plaintiffs' economic theory is plausible. Resolution of that question will end considerable confusion in the lower courts, while contributing mightily to the efficient and equitable resolution of antitrust suits.[3]

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[3] While the Court recently denied certiorari in *Corner Pocket of Sioux Falls, Inc.* v. *Powerhouse Tech.*, 1998 WL 70347 (No. 97-1097) (Feb. 23, 1998), a case that also presented questions concerning the application of *Matsushita*, that action does not militate against review here. In sharp contrast to *Corner Pocket*, in which the court of appeals properly applied *Matsushita*, the decision below creates considerable uncertainty, calling into question the legality of widespread business practices and routine communications along the *vertical* distribution chain. Moreover, *Corner Pocket* would not have presented an appropriate vehicle with which to resolve the question presented here. Most of the plaintiffs' evidence in that case was excluded on hearsay grounds, leaving the plaintiffs to rely exclusively on evidence of conscious parallelism and a unilateral refusal to deal (see *Corner Pocket of Sioux Falls, Inc.* v. *Video Lottery Technologies, Inc.*, 979 F. Supp. 1269, 1281-1285 (D.S.D. 1996)) – and evidence of that sort is not regarded as sufficient to defeat summary judgment in *any* circuit. The choice of legal standard therefore did not affect the outcome in *Corner Pocket*. And *Corner Pocket* presented allegations of a conspiracy that was geographically and temporally limited; this case

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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involves a multi-billion dollar claim that is designed to change the operation of a national industry.

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